



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Holmes Brothers Enterprises, Inc.

File: B-255271

Date: February 23, 1994

Michael J. Gardner, Esq., Clark & Stant, for the protester.
Joseph P. Grassi, Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Ralph O. White, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest that an agency decision to delete critical work items from request for proposals for ship repairs after receipt of initial proposals and to direct that those items be performed in-house was an attempt to improperly circumvent the Small Business Act's certificate of competency procedures is denied where the contracting officer reasonably determined that by removing the critical work items, the agency would be able to comply with the Act's requirements, and all offerors, including the protester, were afforded an opportunity to submit offers based on the revised solicitation.

DECISION

Holmes Brothers Enterprises, Inc., a small business, protests the Department of the Navy's decision, under request for proposals (RFP) No. N62678-93-R-0137, issued by the Navy for repairs on the USS GUAM, to delete certain work items after receipt of initial proposals and to request best and final offers (BAFO). Holmes contends that the agency deleted the work items to circumvent the Small Business Administration's (SBA) certificate of competency (COC) procedures.

We deny the protest.

The RFP, issued August 31, 1993, contemplated the award of a fixed-price, time and materials contract. The RFP listed approximately 50 separate work items constituting the basic requirement and option items. Offerors were required to submit a lump sum price for the basic requirement, and a separate lump sum price for the option items. The RFP required that all work on the ship begin on October 6, and

be completed by November 12. Award was to be made to the offeror whose proposal was most advantageous to the government, price and other factors considered.

Of the six proposals the agency received by the September 29 due date, Holmes submitted the lowest-priced, technically acceptable offer, placing the firm in line for award. On October 4, the agency conducted a preaward survey of Holmes which covered the following critical areas: technical capability, production capability, quality assurance capability, management capability, environmental considerations, subcontractor control, and ability to meet work schedule. The survey team rated each of the critical areas, except one (technical capability), as a "major risk," and assigned an overall rating of "major risk" to the protester's proposal.

The report provided to the contracting officer stated that:

"[Holmes' personnel] had been kicked off the USS MILWAUKEE for poor performance, drinking on the job, using abusive language, and threatening Naval personnel. . . . that the lack of adequate on-site supervision or quality assurance personnel led to the problems on [the USS MILWAUKEE] . . . other areas of concern [included]: total manning, quality assurance, past performance, and on-site management. . . ."

As a result, the survey team concluded that Holmes had not adequately addressed these concerns during the preaward survey, and had made no changes to its organizational structure to assure that the problems encountered on the USS MILWAUKEE would not be repeated on the USS GUAM. The preaward survey team concluded that Holmes was not a responsible contractor to perform this effort and recommended that the firm not be awarded the contract.

The contracting officer, upon receipt of the report, and considering that under the Small Business Act any determination that Holmes was nonresponsible would have to be referred to the SBA under its COC procedures,¹

¹Responsibility refers to an offeror's apparent ability and capacity to perform all contract requirements. See Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297. The Small Business Act, 15 U.S.C. § 637(b)(7) (1988), provides that when a procuring agency determines that a small business concern will be unable to satisfactorily perform a given contract due to questions regarding the firm's responsibility, the agency must refer the matter to

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determined that work on certain critical mechanical items could not be delayed pending a COC determination. The contracting officer reached this conclusion because the ship's operational schedule called for the USS GUAM to proceed to Guantanamo Bay, Cuba immediately following the scheduled completion for the repairs to participate in training exercises crucial to the ship's scheduled deployment to other parts of the world. After calculating that work on critical mechanical items covered by the RFP had to begin by October 12, at the latest, the contracting officer deleted from the RFP the critical work items which required immediate startup, and directed Navy personnel to perform those items.² The contracting officer retained in the solicitation all other noncritical work items.

On October 6, the agency issued amendment No. 0007 to the RFP, deleting 13 work items from the RFP and calling for BAFOs based on the revised RFP by October 8. All of the offerors responded to the request for BAFOs, and prices ranged from \$434,019 to \$772,173. Norshipco submitted the lowest-priced BAFO and Holmes was the offeror with the second lowest price. After concluding that Norshipco was technically acceptable and responsible, the contracting officer determined that Norshipco's proposal was most advantageous to the government, and offerors were advised that the Navy had selected Norshipco for award. Holmes filed this protest in our Office on October 7,³ contending that the agency revised the RFP to improperly circumvent SBA's COC procedures.⁴

¹ (...continued)

SBA for COC consideration. See PHE/Maser, Inc., 70 Comp. Gen. 689 (1991), 91-2 CPD ¶ 210.

²These critical items were mechanical in nature, rather than cosmetic or structural, and included, for example, repairs to the vessel's major electrical power equipment, steam valves, and emergency diesel generator.

³Pursuant to Federal Acquisition Regulation (FAR) § 33.104(b)(1), the head of the procuring activity determined that urgent and compelling circumstances significantly affecting the interests of the United States would not permit awaiting a decision from our Office, and awarded the contract to Norshipco on October 14.

⁴In its initial protest letter, Holmes Brothers also alleged that the agency's request for BAFOs constituted an impermissible auction. The agency responded fully to this allegation in its report to our Office, and the protester did not take issue with the agency's position in its

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We find no basis to conclude that the agency's decision to delete the items from the RFP and request BAFOs from all offerors was a ruse to avoid award to Holmes or to improperly circumvent the SBA's COC procedures. Instead, the contracting officer deleted only the critical work items that had to be completed prior to the ship's departure for the scheduled training exercise, and directed that those items be performed without delay by Navy personnel. With respect to the remaining items, the agency explained that if a small business was the low offeror following BAFOs, and was found to be nonresponsible, the contracting officer would have referred the matter to SBA for COC review.⁵ According to the Navy, depending on the amount of time remaining following that review, much of the work in the revised RFP might have been completed prior to the ship's required departure. Further, the Navy stated that the noncritical items not completed by the scheduled departure date could be deferred until a later time.

While Holmes believes that the Navy has improperly attempted to avoid awarding it this contract, there is no evidence of improper action here. In fact, by deleting the critical items from the RFP and performing them in-house, the Navy assured that it could comply with the Small Business Act if a small business submitted the best offer for the remaining work items but was rejected as nonresponsible.⁶ After revising the RFP, the contracting officer gave all offerors, including Holmes, an opportunity to submit BAFOs, and there

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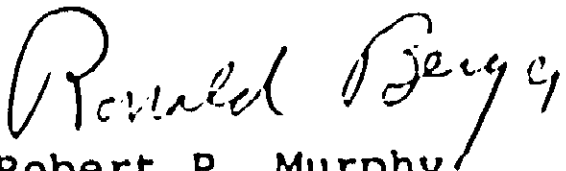
comments. Accordingly, we consider this protest issue abandoned. See University of Dayton Research Inst., B-245431, Jan. 2, 1992, 92-1 CPD ¶ 6.

⁵The language and legislative history of the Small Business Act and SBA's implementing regulations provide no exception to this referral procedure, even where a competitive procurement is considered urgent. See Neal R. Gross and Co., Inc., B-217508, Apr. 2, 1985, 85-1 CPD ¶ 382; F & E Pizano Trucking Co., Inc., B-212769, Nov. 30, 1983, 83-2 CPD ¶ 629.

⁶For example, had the contracting officer referred a nonresponsibility determination to SBA after BAFOs, the contracting officer would have awarded the contract to another offeror if the SBA did not issue a COC within 15 business days after the referral. FAR § 19.602-4(c). The agency states that, although it is highly speculative as to exactly what would have occurred, it was possible that some of the work retained in the RFP could have been completed--even at that late date--before the ship's scheduled departure for Cuba.

is no evidence to suggest that the agency was not prepared to award to Holmes if Holmes prevailed in the reopened competition. However, the record shows that when BAFOs were received the contracting officer reasonably determined that Norshipco's low-priced offer was most advantageous to the government. Under these circumstances, we have no basis to object to the award decision here.

The protest is denied.

for 
Robert P. Murphy
Acting General Counsel